Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	
	)	WC Docket No. 06-122
Petition for Declaratory Ruling of the Nebraska Public Service Commission and the Kansas Corporation Commission for Declaratory Ruling, or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues	)	

COMMENTS
of the
DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION

The District of Columbia Public Service Commission ("DC PSC") hereby submits these Comments in response to the Public Notice in the above-captioned proceeding.[1] We fully support the request of the Nebraska Public Service Commission ("NPSC") and the Kansas Corporation Commission ("KCC") and urge the Commission to issue the declaratory rulings.

BACKGROUND

Voice over Internet Protocol ("VoIP") is an Internet application used to transmit real-time, two-way voice communications over a broadband Internet connection, rather than the legacy circuit-switched network used by traditional voice communications providers, the Public Switched Telephone Network ("PSTN"). Interconnected VoIP service permits users to receive calls *from* the PSTN and terminate calls *to* the PSTN. Some VoIP service providers offer "fixed" service, that is, service that originates from a

[1] *Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket 06-122, filed July 16, 2009 ("*Petition*"), Public Notice, DA 09-1774, August 10, 2009.

fixed location, such as a customer's residence. Other VoIP service providers offer "nomadic" service, that is, service that allows a customer to connect to the Internet wherever a broadband connection is available, such as, an Internet Café or WiFi "hot spot."[2]

Until 2006, interconnected VoIP service providers were not required to make any contribution to the federal Universal Service Fund ("Fund" or "USF"). In that year, the Federal Communications Commission ("FCC" or "Commission"), concerned about the stability and sufficiency of the Fund, established a federal Universal Service contribution obligation for providers of interconnected VoIP service, based on their interstate and international end-user telecommunications revenues.[3] The FCC recognized that it is difficult for some interconnected VoIP service providers to separate their traffic on a jurisdictional basis, that is, to separate interstate and international traffic, over which the FCC has jurisdiction, from intrastate traffic, over which the affected state has jurisdiction.[4] The FCC determined that it would be reasonable to conclude that 100% of VoIP traffic is interstate for USF purposes. Nevertheless, the Commission decided to establish a "safe harbor" that is lower than 100%; it set the safe harbor at 64.9 percent for interstate/international.[5] Under the FCC's approach, the interstate allocation of 64.9 percent for interstate would be balanced by an allocation of 35.1 percent for intrastate.[6]

Many states have intrastate Universal Service Funds which are used to support intrastate programs such as, in the case of the District of Columbia, Lifeline service.

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2 The requested declaratory rulings apply only to nomadic VoIP service. As NPSC and KCC explain, there is no need for a declaratory ruling regarding fixed VoIP service because fixed VoIP service providers generally use landline facilities directly to fixed customer locations. *Petition* at 8. However, in the interest of avoiding future unnecessary litigation, the Commission's decision in this matter should explicitly apply to both nomadic and fixed interconnected VoIP service providers.

3 *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) ("*VoIP Contribution Order*"), *aff'd in part and rev'd in part, Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

4 *Id.* at ¶ 53.

5 *Id.*

6 The FCC also allowed two substitutes for the safe harbor allocation. An interconnected VoIP provider may rely on traffic studies to determine the percentage of interstate calls or, to the extent a carrier develops the capability to track jurisdictional allocations, it may use the actual percentage of interstate calls. *Id.* at ¶ 56.

These intrastate funds are derived from the intrastate revenues of telecommunications providers and are intended to mirror the federal Universal Service Fund, which is derived from interstate revenues.

Many states are also concerned about the sufficiency and sustainability of their Universal Service Funds, just as the FCC was when it determined that VoIP service providers should be required to contribute to the federal USF. Many also recognize the threat to competitive neutrality that occurs when one segment of the competitive arena (VoIP service providers) is absolved of the contribution obligation, while another segment (traditional local exchange carriers) is not. For these reasons, many states are considering whether to apply the intrastate universal service support obligation to interconnected VoIP service providers.[7]

There is, however, a substantial obstacle to the states going forward: uncertainty as to whether the FCC has preempted state assessments on nomadic VoIP service providers. This uncertainty stems from the decision in *Vonage Holdings Corp. and Vonage Network, Inc v. Nebraska Public Service Commission et al.*, 564 F.3d 900 (8th Cir., May 1, 2009)(*"Vonage v. NPSC")*. There, the Eighth Circuit found reasonable the District Court's interpretation that the FCC has determined that, given the impossibility of distinguishing between interstate and intrastate nomadic interconnected VoIP traffic, the FCC must have sole regulatory control.[8] Thus, according to the panel,

> [w]hile a universal service fund surcharge could be assessed for intrastate VoIP services, the FCC has made clear it, and not state commissions, has the responsibility to decide if such regulations will be applied.[9]

This conclusion is puzzling since the FCC had filed an *amici curiae* brief (with the United States) in the case, specifically arguing that it had *not* preempted the NPSC's decision to require an intrastate universal service contribution.[10] Indeed, the preemption

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7 In the case of the District of Columbia, D.C. Law 17-165, enacted in 2008, specifically requires that the DC PSC bill and collect the annual universal service subsidy from local exchange carriers *and* VoIP service providers. *See* DC ST§ 34-2003.

8 *Vonage v. NPSC* at 905.

9 *Id.*

case relied on by the court, *Minnesota Public Utilities Commission v. FCC*, 483 F.3. 570 (8th Cir. 2007) ("*MPUC*"), had involved the MPUC's entry and tariff regulations, not intrastate Universal Service support obligations. The FCC did not address, let alone preempt, the states' universal service support obligations of nomadic and fixed interconnected VoIP service providers.[11]

DISCUSSION

Declaratory Ruling on Preemption of State USF Assessments

The Petition actually requests two declaratory rulings. The first of these goes directly to the uncertainty created by *Vonage v. NPSC*. It appears that the Eighth Circuit and the Commission disagree about whether the Commission intended to preempt state assessment of USF contributions for intrastate VoIP services. In order to resolve the uncertainty caused by this apparent disagreement, it is important that the Commission step in and clear up the matter. States which have mandates from their legislatures, such as the District of Columbia, need clarity in order to proceed. It is well within the Commission's discretion to issue a declaratory ruling in order to terminate a controversy or remove uncertainty.[12] Moreover, the NPSC and KCC have made an excellent argument in support of the requested ruling, pointing out that State USF assessments complement, rather than conflict with, federal requirements. Indeed, as the Petition points out, there is evidence of this found in the bi-jurisdictional field of wireless services regulation, where state assessments of intrastate wireless service USF contributions are based on the inverse of the federal safe harbor for determining interstate wireless revenues.[13] There is no conflict with federal requirements found in a state's assessment of USF contributions, so long as the state follows the federal approach and creates a safe

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10 *Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellant's Request for Reversal, Vonage Holdings Corp. and Vonage Network Inc v. Nebraska Public Service Commission et al.*, No. 08-1764, August 5, 2008.

11 *Id.* at 14.

12 *See* 47 C.F.R. §1.2, 5 U.S.C. § 554(e). *See also Yale Broadcasting Company v. Federal Communications Commission*, 478 F.2d 594, 602 (1973).

13 *Petition* at 16, citing *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 1735 (1997), aff'd. 168 F.3d 1332 (D.C, Cir. 1999); *Texas Office of Public Utility Counsel*, 183 F.3d 393 (5th Cir. 1999); *Sprint Spectrum, L.P. v. Kansas State Corp. Commission*, 149 F.3d 1059 (10th Cir. 1998).

harbor which mirrors the federal safe harbor. The Commission should issue a declaratory ruling which makes it clear that the FCC has not preempted state USF assessment of intrastate nomadic and fixed interconnected VoIP services revenue.

Declaratory Ruling on Safe Harbor Mechanisms the States Can Use

The second ruling sought in the *Petition* concerns the potential for conflict or overlap among various states attempting to implement similar regulations. There is no doubt that there is a potential for duplicative surcharges unless there is agreement among the states as to the methodology to be used to determine which state may assess USF contributions. Indeed, the Eighth Circuit found that the potential for conflict between state regulations militates in favor of preemption.[14]

We agree that the potential for conflict is troublesome. Therefore, we support the request made in the Petition that the FCC declare that states have the discretion to adopt mechanisms that do not assess interstate revenues and that contain procedures designed to ensure that no VoIP service provider pays assessments to more than one state on the same intrastate revenues.[15] The states will need this flexibility to iron out inconsistencies as they occur. The *Petition* suggests that the Commission also identify a safe harbor provision for the states to use to assure a uniform methodology. Specifically, the Petition suggests three methods by which a state may assess USF contributions from nomadic VoIP providers: use of the billing address; use of the registered 911 address; use of the allocations derived from the VoIP service providers' Form 499-A reports. Any one of these, if adopted as the safe harbor by the FCC, could be used by states to be sure of a consistent methodology. This would avoid expensive litigation and would create a strong incentive for a state to use the safe harbor mechanism.

We support the use of the billing address methodology, so that each state would assess revenues from customers with a billing address in that state. This is superior to the other two methodologies because, unlike the Form 499-A approach, it does not allow the VoIP service provider to "game the system" by allocating revenues to states depending on their contribution rates. Nor does it rely upon customers to register for the purpose of receiving 911 service. There is no FCC requirement that customers register and provide

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14 *Vonage v. NPSC* at 906.

15 *Petition* at 28.

a local address for emergency 911 services. While this might be the smart thing to do, we suspect that many nomadic VoIP service customers have not yet registered and so would not be on any 911 service address list. Yet, every interconnected VoIP service customer is likely to have a billing address. For this reason, we urge the Commission to identify use of billing addresses as a "safe harbor" for states to use to assess state USF contributions to nomadic and fixed interconnected VoIP service providers.

CONCLUSION

For the above reasons, the District of Columbia Public Service Commission urges the Commission to grant the declaratory rulings requested by the Nebraska Pubic Service Commission and the Kansas Corporation Commission.

Respectfully submitted,

DISTRICT OF COLUMBIA
PUBLIC SERVICE COMMISSION

By Richard A Beverly
Richard A. Beverly, General Counsel

VM Ahern
Veronica M. Ahern, Attorney Adviser

1333 H Street, NW
West Tower
Washington, DC 20005
202-626-5143

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